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July 17, 1997

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VIA HAND DELIVERY

Mr. William Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

**Re: Petition for Rulemaking to Amend 47 C.F.R. § 76.1003 --
Procedures for Adjudicating Program Access Complaints:
RM No. 9097**

Dear Mr. Caton:

EchoStar Communications Corporation ("EchoStar"), by its attorneys, hereby submits for filing an original and nine copies of its Reply Comments in connection with the above-captioned matter.

Also enclosed is an additional copy of EchoStar's Reply Comments which we ask you to date stamp and return with our messenger.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,



Philip L. Malet
Pantelis Michalopoulos
Colleen A. Sechrest
Counsel for EchoStar Communications
Corporation

Enclosures

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Petition for Rulemaking)
to Amend 47 C.F.R. § 76.1003-)
Procedures for Adjudicating)
Program Access Complaints)
_____)

RM No. 9097

**REPLY COMMENTS OF ECHOSTAR
COMMUNICATIONS CORPORATION**

EchoStar Communications Corporation ("EchoStar") hereby respectfully submits reply comments in connection with the above-captioned Petition of Ameritech News Media, Inc. ("Ameritech") for a rulemaking that would implement long overdue changes to the procedural rules governing "Section 628" complaints. *See* 47 U.S.C. § 628. The statutory complaint process was meant to deter anti-competitive practices by cable operators and affiliated programmers. It has largely failed to achieve that goal, however, because it lacks enforcement "teeth." Ameritech's Petition would be a positive step in the direction of making the process a more meaningful deterrent. This is particularly important in light of the surge of recent and planned consolidations within the cable industry.^{1/} EchoStar, therefore, supports Ameritech's

^{1/} See Comments of The Wireless Cable Association International, Inc. at 2-9.

request for time limits, discovery as of right and damage awards. The Commission should promptly initiate a rulemaking to implement these requests.

In opposition to Ameritech's Petition, the cable interests protest that they believe themselves to be adequately deterred from anti-competitive practices. In the words of Home Box Office, "the complaint process does curtail anticompetitive abuses."^{2/} Indeed, Time Warner even goes so far as to declare that "MVPD competition is growing."^{3/} The evidence, however, is to the contrary. As the Wireless Cable Association amply documented in its Comments, the cable industry is currently becoming more, not less concentrated, thereby increasing their control on local distribution.^{4/}

Even if the cable interest's self-serving protestation were accepted, however, they should have nothing to fear from a bolstering of the Commission's enforcement process. The cable interests do not deny a fundamental premise of Ameritech's request for discovery as of right -- that the Commission staff has not allowed or directed discovery in a single Section 628 complaint proceeding.^{5/} The cable interests' purported concern with disclosure of sensitive information can be addressed, when appropriate, by the simple device of a protective order. Nor do the cable commenters offer a principled reason why discovery and damage awards are inappropriate. They do not explain how the prohibition of Section 628 can be meaningfully

^{2/} Comments of Home Box Office at 6. *See also* Comments of Rainbow Media Holdings, Inc. at 3; Comments of National Cable Television Association at 2 & 4.

^{3/} Comments of Time Warner Cable at 3.

^{4/} Comments of the Wireless Cable Association International, Inc. at 3.

^{5/} *See* Comments of Americast at 10; Comments of the Wireless Cable Association International, Inc. at 11.

enforced if the complainants have virtually no access to the facts necessary to meet their evidentiary burden and any unaffiliated cable distributor can violate the prohibition costlessly.

EchoStar, a satellite distributor with no cable affiliation or interests in any programming services, relies heavily for its distribution package on programming services in which its competitors have significant stakes. EchoStar believes that it has been the victim of anti-competitive practices falling within the purview of Section 628 and hence has a direct interest in making the rules governing the complaint process more equitable and less onerous to the complainant. EchoStar knows of virtually no other complaint process where discovery is usually unavailable to the complainant even though the relevant facts are typically in the exclusive possession of the defendant. Furthermore, a Section 628 complaint currently may not be a suitable process for adjudicating conduct potentially inflicting sizable damages on companies like EchoStar, where the Commission may ascertain the damaging conduct but will not prescribe a damage award.

I. DISCOVERY SHOULD BE PERMITTED AS OF RIGHT

The Communications Act prohibits cable operators, affiliated programmers and satellite programming vendors from, among other things,

engag[ing] in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

47 U.S.C. § 628(b).

At the behest of Congress, the Commission has also promulgated several more specific prohibitions against unduly influencing the terms on which programming is made available to unaffiliated MVPDs, discrimination and exclusive contracts. *See* 47 U.S.C. § 628(c).

Proof of any of these practices depends on facts that are typically in the defendant's exclusive custody. Access to such non-public information is indeed necessary to show the "purpose" of certain action by a cable operator, *see* 47 U.S.C. § 628(b), the defendant programming vendor's discriminatory conduct as between an unaffiliated MVPD and an affiliated cable operator, *see* 47 U.S.C. § 628(c), or the improper influencing of the terms on which programming is available, *see id.* It is therefore inherently questionable to require complainants to make a *prima facie* case without access to these facts. The current Commission rules "allow" the prospective plaintiff to request some of this information from the defendant, purportedly in aid of the plaintiff's effort to make its *prima facie* case. *See* 47 C.F.R. § 76.1003(c)(1)(ix). In practice, however, the prospective defendant has little incentive to comply with such requests, since there is essentially no sanction if it does not comply. The rules allow the injured distributor to accompany its complaint with an affidavit stating its "information and belief" about the prohibited practices. *Id.* As a practical matter, however, the Commission staff may not give great weight to such affidavits, unaccompanied as they must be by any other evidentiary support. In the words of Americast, "This [discovery] procedure . . . shields programmers from the inquiry necessary to further the cause of promoting competition. . . . This process, which does not permit complainants to have access to the crucial documents that may be

needed to establish their allegations, is significantly biased in favor of defendant programmers."^{6/}

To enable complainants to meet their evidentiary burdens, the Commission should therefore permit discovery as of right in Section 628 proceedings.

Contrary to the claims of the National Cable Television Association, permitting discovery as of right in Section 628 proceedings will not provide complainants with "the unbridled ability to engage in burdensome, time consuming, and expensive fishing expeditions."^{7/} Such discovery can be limited, as suggested by Americast, to inquiries tailored to obtain the information relevant to establishing a complainant's case.^{8/} This limited discovery thus remedies an imbalance in the Commission's complaint process without unduly burdening the Commission's resources or adding significantly to the length of the proceeding.

Furthermore, permitting discovery will not, as Time Warner claims, "inevitably lead to breaches of confidentiality."^{9/} This concern can be addressed by existing Commission procedures for obtaining protective orders. Under these procedures information marked as "proprietary" may be withheld from public inspection and, in appropriate cases, may be disclosed only to counsel, consultants and specified officers or employees of the opposing party directly involved in the prosecution or defense of a case. See 47 C.F.R. §§ 0.459 & 76.1003(h).

^{6/} Comments of Americast at 10.

^{7/} Comments of National Cable Television Association at 7.

^{8/} Comments of Americast at 11.

^{9/} Comments of Time Warner Cable at 9-10.

II. THE COMMISSION SHOULD EXERCISE ITS POWER TO AWARD DAMAGES

The cable interests do not persuasively rebut Ameritech's cogent comments in support of damage awards in Section 628 proceedings. They simply reiterate the Commission's earlier views, expressed several years ago, that the damage remedy was not necessary "at the time."^{10/} As the Commission stated in the 1994 Memorandum Opinion and Order, it stands ready to revisit that view. Since that time, the early experimental period of the process, where the Commission was appropriately cautious as a "prudential" matter, has passed. The costlessness of Section 628 violations for the cable operators has made the complaint process one that does not deter violators from the prohibited conduct and does not appeal to victims of that conduct. As Americast argues in its Comments, "[a]n effective damage remedy will eliminate the perverse incentives that are an inadvertent consequence of the current regulatory structure, encourage aboveboard behavior by vertically integrated cable programmers, encourage fair settlements and, above all, promote the competition that Congress envisaged in crafting Section 628."^{11/} It is accordingly imperative that the Commission revisit the question now by instituting the rulemaking proceeding requested by Ameritech.^{12/}

^{10/} *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd. 1902, 1904 (1994).

^{11/} Comments of Americast at 13.

^{12/} Nor need the Commission reach a definitive conclusion on the question of damages now. All that Ameritech is requesting is a Notice of Proposed Rulemaking.

III. CONCLUSION

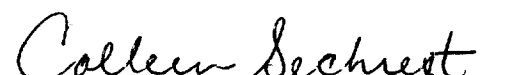
For the foregoing reasons, EchoStar supports Ameritech's request for the initiation of a rulemaking proceeding to revise the rules governing the Section 628 complaint process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Colleen Sechrest, do hereby certify that a copy of the foregoing **Reply Comments Of EchoStar Communications Corporation** has been sent, via first class mail, postage prepaid (or as otherwise indicated), on this 17th day of July, 1997 to the following:

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